

DRAFT

IN THE MATTER OF

DAVID E. RICE) NATURAL RESOURCES PROTECTION ACT
South Bristol, Lincoln County) COASTAL WETLAND ALTERATION
REMOVAL OF SPECIAL CONDITION #5) APPEAL
L-23698-4E-B-Z) FINDINGS OF FACT AND ORDER
(appeal granted, application for minor revision approved)	

Pursuant to the provisions of 38 M.R.S.A. Sections 344 and 341-D (4) and Chapter 2, Section 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of DAVID E. RICE, its supportive data, the response of interested parties, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On June 1, 2007, DAVID E. RICE (applicant or appellant) filed a Natural Resources Protection Act (NRPA) application to construct a 12 foot wide by 110 foot long pile supported commercial pier. Associated proposed structures included a 4 foot wide by 34 foot long seasonal ramp, a 20 foot wide by 12 foot long seasonal float, a 6 foot wide by 6 foot long access platform, 4 foot wide by 14 foot long combination access stairs and trap chute, and an 8 foot wide by 10 foot long by 10 foot high equipment shed to be placed at the landward end of the pier abutting the shoreline. In accordance with its general practice the Department requested review of the proposed projects from some of its sister agencies, such as the Department of Marine Resources (DMR). DMR visited the project site and submitted comments on the proposed activity, stating that the project would not significantly impact traditional fishing activity, recreation, navigation, or riparian access. DMR further commented that shading and subsequent loss of marine vegetation would be a likely result of the project. The Department staff inspected the site and took photographs on June 22, 2007, July 2, 2007, and September 5, 2007. Comments were also received from abutting property owners expressing their concerns about title, right, or interest, existing scenic, recreational, and navigational uses, soil erosion, and coastal wetland considerations.

In Department Order #L-23698-4E-A-N, dated October 11, 2007, the Department approved the construction of the commercial pier and its associated structures. In that Order, the Department included a condition of approval, Special Condition #5, which states that "No trap storage will be permitted on the permanent pier." This special condition was placed on the Order in an effort to minimize further impacts to the coastal wetland such as shading effects and to minimize potential impacts on the scenic and aesthetic uses of the resource. On November 9, 2007, a group of interested parties filed a Petition for Review of the Department Order with the Lincoln County Superior Court. While the judicial appeal was pending, the interested parties brought to the Department's attention additional information related to the application analysis that had not been before the Department during its review of the application. In order to consider and review this

new information, the Department requested that the court remand the matter back to the Department. On February 25, 2008, the court remanded the matter to allow the record to be re-opened to give the Department the opportunity to consider new information from both the interested parties and the applicant.

After reconsideration of the evidence in the record and comments received, in Department Order #L-23698-4E-A-A, dated September 10, 2008, the Department again approved the proposed project. The Order included the same Special Condition #5 prohibiting the storage of traps on the pier.

On October 10, 2009, Cornelia Johnson, John Rounds, A.C. Pavis-Rounds, Peter Rounds, Dirk Brunner and Linda Brunner filed a timely appeal of Department Order #L-23698-4E-A-A to the Board of Environmental Protection (Board). The appellants requested that the Board reverse the Department's approval of the application and argued points on title, right, or interest; soils; existing scenic, aesthetic, recreational, and navigational uses; and coastal wetland considerations. The applicant did not contest any facts, conclusions, or conditions of the permit during the appeal. In Board Order #L-23698-4E-A-Z, dated April 16, 2009, the Board denied the appeal and affirmed the underlying Order.

On June 24, 2009, the applicant filed an NRPA minor revision application requesting the removal of Special Condition #5 in order to allow his 600 lobster fishing traps to be stored and repaired on the permitted pier at any time. In Department Order #L-23698-4E-B-M, dated July 15, 2010, the Department denied the application for the minor revision based upon potential impacts to the coastal wetland and its determination during the review process that practicable alternative locations for trap storage were available to the applicant, that together led the Department to conclude that the impacts of that aspect of the proposed project would be unreasonable.

On August 11, 2010, the applicant filed a timely appeal of Department Order #L-23698-4E-B-M to the Board.

On July 27, 2010, the Department of Marine Resources (DMR) submitted a letter to the Department altering its previous assessment of potential adverse impacts to the marine habitat at the project site from shading as a result of trap storage on the applicant's permitted pier. On September 16, 2010, DMR submitted a letter that included further details of their new assessment of the project's impacts. On October 7, 2010, the Board Chair ruled that this supplemental evidence would be admitted into the record and gave interested persons an opportunity to respond to it. Interested parties submitted letters with associated supplemental evidence dated September 2, 2010, October 20, 2010, and October 22, 2010 in opposition to DMR's new assessment.

2. STANDING:

The Board finds that the applicant for the permit revision, DAVID E. RICE, is the permittee and is therefore an aggrieved person as defined in Chapter 2, Section 1(B), and may bring this appeal before the Board.

3. FINDINGS & CONCLUSIONS OBJECTED TO AND BASIS FOR APPEAL:

The appellant objects to the Department findings and conclusions relating to Coastal Wetland Considerations.

The appellant asserts that the Department erred in its finding of fact that the proposed activity of storing lobster traps during the winter months in the pier would result in unreasonable harm to the coastal wetland, caused by shading impacts to marine life, and that the appellant has practicable alternatives for the storage of his traps.

4. REMEDY REQUESTED:

The appellant requests that the Board reconsider the new supportive evidence submitted by DMR and remove Special Condition #5 from Department Order #L-23698-4E-A-A.

5. DISCUSSION AND RESPONSE TO APPEAL:

The appellant asserts that the Department's findings and decision were based on an erroneous habitat assessment by DMR. The appellant submitted documentation, including a letter from DMR, in support of the appellant's view that shading caused by the storage of his traps will not cause an unreasonable impact to the coastal wetland.

During the Department's review of the original permit application, the Department received comments from DMR regarding potential impacts to the marine environment at the project site from the construction of the commercial pier system. In comments dated September 6, 2007, DMR stated that the coastal wetland in the location of the permitted pier is geologically characterized as being primarily ledge with combinations of ledge, stone, cobble, and gravel with about 75% coverage of rockweed, a species of marine vegetation. DMR further commented that shading and subsequent loss of marine vegetation would likely result from the project. Rockweed was the only marine vegetation observed by DMR staff during their visit to the project site on July 16, 2007. Department staff visited the project site on June 22, 2007, July 2, 2007, September 5, 2007, July 2, 2009, and March 2, 2010. DMR's observations were confirmed at these site visits.

Interested parties, comprised of abutting property owners, expressed several concerns during review of the original application in relation to the project's possible impacts, among others, to scenic, recreation, and navigational uses of the area. Specifically, interested parties asserted that the project would negatively affect the scenic view from abutting properties, the surrounding cove area, and Carlisle Island; the dimensions of the project were not proportionate to the size of an adjacent existing commercial pier; the project would create a safety and navigational hazard; and the project would conflict with the municipality's shoreland zoning ordinance. Although the Department found that the project would not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource, the Department considered the interested parties concerns in its final decision on the application.

Based upon DMR's comments, all of the interested parties' concerns, and given that the storage of traps on the pier could exacerbate potential adverse impacts on the coastal wetland, and with the finding that practicable alternatives existed for trap storage, Special Condition #5 was included in the Order.

During its review of the appellant's minor revision application in 2009, the Department again solicited comments from DMR regarding potential impacts to the marine environment at the project site that would likely result from year-round storage of the appellant's lobster fishing traps on the permitted pier. In comments dated August 31, 2009, DMR commented that storage of traps would contribute to shading of marine vegetation and the deposition of debris from trap maintenance onto the intertidal area and surrounding waters. DMR further commented that upland storage of traps, where possible, was preferred, and appeared to be a reasonable option in this case. DMR recommended that the current permit condition prohibiting storage of traps on the permitted pier remain in effect.

Based largely upon DMR's comments, the Department determined that a permanent loss of aquatic habitat due to a lack of sunlight and shading effects from the storage of the applicant's traps would occur over time.

The Department's Wetland and Waterbodies regulations, Chapter 310 §§ 4 & 5, define coastal wetlands as wetlands of special significance and deem that a practicable alternative is considered to exist unless the proposed project is a water dependent use. In consideration of the potential loss of aquatic habitat and a determination that the storage of the appellant's traps is not a water dependent use, plus evidence that the appellant had reasonable alternative storage locations available to him, the Department found that the impacts of the appellant's proposal to the functions and values of the coastal wetland were unreasonable. On this basis, the Department denied the appellant's proposal in Department Order #L-23698-4E-B-M, dated July 15, 2010.

Subsequent to the denial of the application for a revision, in Department Order #L-23698-4E-B-M, the Department received a letter from DMR, dated July 27, 2010, which stated that the agency erred in its August 31, 2009 comments to the Department regarding the appellant's proposal. DMR states that it believes that the storage of the appellant's traps would not result in adverse impacts from shading of nearby marine vegetation. DMR submitted further comments dated September 16, 2010, which provided details and citations to relevant biological studies on the functional ecology of rockweed to support the retraction of its August 31, 2009 comments. These studies state that rockweed can survive long periods in the dark and have a protection mechanism against damage from high light levels. Further, the studies states that growth of rockweed is zero to negligible during the winter months; therefore, shading effects from storage of traps would not affect the rockweed surrounding the permitted pier. DMR's revised comments are also based upon examination of the orientation of the appellant's permitted pier with relation to varying angles of the sun and the specific type of substrate found at the project site.

The Board Chair reviewed the proposed supplemental evidence from DMR in accordance with Chapter 2 (24)(B)(5). The Chair ruled that DMR's letters of July 27, 2010 and of September 16, 2010, are relevant, material, and central to the issue raised in the appeal and admitted them into the record. The Chair also allowed interested persons to respond to DMR's letter.

John A. Rounds and A. Carolyn Pavis-Rounds submitted letters in response to the appeal and the new comments submitted by DMR. Although documentation was not provided, Mr. Rounds and Ms. Pavis-Rounds state that a study by the University of Maine's Darling Marine Center confirmed that benthic diatoms are commonly active during the winter months and are an important food supply for a number of marine organisms. Benthic diatoms are a type of single-celled algae that live within the marine sediment. Diatoms are commonly used in studies of water quality and as a monitoring environmental conditions. For this reason, Mr. Rounds and Ms. Pavis-Rounds contend that the appellant's proposal will negatively contribute to potential impacts to the diatoms and other marine organisms over time and significantly harm the natural functions and values of the coastal wetland.

With the admission of the supplemental evidence, the Board considered all of the evidence in the record and the arguments submitted by the appellant and interested persons. The Board generally grants the judgment and expertise of DMR significant weight when assessing potential impacts to the marine environment. In this particular case, DMR assessed and then re-assessed the potential impacts to the coastal wetland as a result of trap storage on the appellant's permitted pier. After its re-assessment, DMR's opinion is that given the permitted pier's north-south orientation and the overall vigorous and sustainable nature and abundance of rockweed, storage of the applicant's traps on the permitted pier would not have a significant adverse impact on the resource. After weighing a number of varying factors at the project site such as the percentage of light transmittal through the traps, the orientation of the sun, the likely seasonal storage, the likely duration of storage, and the number of traps to be stored on the permitted pier with the frequency of comparable commercial activities in the Clark Cove area that are subject to these same factors and given the results of DMR's newly provided habitat assessment and biological studies supporting its position, the Board finds that the appellant's proposal will not cause a permanent loss of functions or values of the coastal wetland.

In accordance with the Department's "Wetlands and Waterbodies Rules," Chapter 310, §5, in the determination of whether the impacts of a project are unreasonable, the Board considers whether there are practicable alternatives to the project that would be less damaging to the environment. The Board may determine that an activity will result in an unreasonable impact if the activity will cause a loss in wetland area, functions, or values, and there is a practicable alternative to the activity that would be less damaging to the environment. In coastal wetlands, which are wetlands of special significance, a practicable alternative is considered to exist unless the project is necessary for water dependent uses, health and safety, walkways, crossings by road, rail or utility lines, or meets other specified criteria which are inapplicable here. A water dependent use is defined as:

“A use which cannot occur without access to surface water. Examples of uses which are water dependent include, but are not limited to, piers, boat ramps, marine railways, lobster pounds, marinas and peat mining. Examples of uses which are not water dependent include, but are not limited to, boat storage, residential dwellings, hotels, motels, restaurants, parking lots, retail facilities and offices.”

In its decision on the appellant’s application seeking removal of Special Condition #5, the Department concluded that the appellant’s proposed storage of traps was not a water dependent use, in part based on the availability of alternative sites for that purpose. Specifically, the Department determined that the appellant could use a portion of the upland area at the project site, the existing mooring and float at “The Gut”, the existing pier at Jones Point, or a combination of all sites. These alternatives are discussed in more detail as follows:

- a. Use of Upland Area. The east side of the property which is principally used for parking provides space for a limited amount of traps to be stored; however, this upland site may not accommodate the storage of all of the appellant’s traps due to the presence of structures on the north, south, and west side of the property. Due to the presence of a recently installed septic system and leach field, traps cannot be stored on the east side of the property. The east side of the property is further restricted due to an existing parking area that is specifically used for the property owner’s caregivers.
- b. Mooring and Float at “The Gut”. The appellant’s traps can be stored on the float at the applicant’s mooring in “The Gut”; however, the Department determined that this float can provide space for a limited number of the appellant’s traps. Moreover, the mooring and associated float and intended to be used for safe harbor purposes only.
- c. Existing Pier at Jones Point. While the appellant currently uses the existing pier at Jones Point to store his lobster fishing traps during the fishing off-season, he contends that this pier is inconvenient, is in disrepair, and cannot bear the weight of his traps.

The Board has considered the information contained in the permitting record, the supplemental evidence admitted during the administrative appeal, and the arguments of the appellant and interested persons in relation to the viability and feasibility of alternative locations to store the appellant’s traps. Given that the appellant’s need for trap storage stems from his occupation of commercial fishing, that storing traps on his pier would make working with his necessary occupational gear an easier and more efficient task, and that the appellant does not own or have control of the upland area adjacent to the pier, the Board finds that in this particular circumstance the storage of the appellant’s lobster fishing traps may be considered a water dependent use. In light of the appellant’s arguments, the Board has re-considered the alternatives and the drawbacks of each option. The Board finds that each of the alternatives for the storage of the appellant’s lobster fishing traps has some drawbacks.

After balancing the minimal impacts that may result from the storage of the appellant's traps as described by DMR with the superior practicality over the other alternatives and given the fact that the project purpose is to support the appellant's commercial fishing need, which is a traditional use of the wetland, and based upon consideration that the resource has withstood impacts by other commercial activities in the cove area and from the appellant's permitted and fully completed pier as evidenced in photographs and site visit summaries provided by the applicant and Department staff, the Board finds that the amount of indirect impact to the resource directly surrounding the permitted pier and which would be caused by the storage of the appellant's 600 lobster fishing traps is reasonable and likely to be insignificant. On these bases, the Board finds that the storage of the appellant's lobster fishing traps directly on top of the permitted pier described in Department Order #L-23698-4E-A-A, and located in Clark Cove in the Town of South Bristol will not result in an unreasonable adverse impact to the coastal wetland. The Board concludes that Special Condition #5 may be eliminated from Department #L-23698-4E-A-A.

Based on the above findings, the Board concludes that:

1. The appellant filed a timely appeal.
2. The appellant's proposal to remove Special Condition #5 from Department Order #L-23698-4E-A-A meets the criteria for approval pursuant to the NRPA, as set forth in 38 M.R.S. §480-D

THEREFORE, the Board REVERSES the Department's decision in Department Order #L-23698-4E-B-M, and GRANTS the appeal of DAVID E. RICE. The minor revision application of DAVID E. RICE which requests removal of Special Condition #5 from Department Order #L-23698-4E-A-N, and subsequent orders, in the Town of South Bristol, Maine is approved.

DONE AND DATED AT AUGUSTA, MAINE, THIS _____ DAY OF _____, 2011.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan M. Lessard, Chair